NOT FOR PUBLICATION [Docket Nos. 6, 7, 10]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE

LISA BIDLINGMEYER, Plaintiff, v. BROADSPIRE and JOHNSON & JOHNSON, Defendants.	Civil No. 11-6144 RMB/AMD OPINION

Thomas F. Sacchetta
Sacchetta & Baldino, Esqs.
Executive Center of Greentree
1 Eves Drive, Suite 111
Marlton, New Jersey 08053
Attorneys for Plaintiff

Francis X. Dee
McElroy, Deutsch, Mulvaney, & Carpenter LLP
Three Gateway Center
100 Milberry Street
Newark, New Jersey 07102
Attorneys for Defendants

BUMB, United States District Judge:

Plaintiff Lisa Bidlingmeyer ("Plaintiff") asserts that the Defendants Broadspire and Johnson & Johnson (the "Defendants") wrongfully denied her disability benefits to which she was entitled. Plaintiff has moved to remand the matter to state

court, where it was originally filed. Defendants have moved for judgment on the pleadings. For the reasons that follow, Plaintiff's motion is DENIED and Defendants' motion is GRANTED.[1]

I. Background

Plaintiff was employed by Defendant Johnson & Johnson and, through her employment, was entitled to short-term and long-term disability coverage. Plaintiff claims that she suffered a disabling injury and that she sought, and obtained, coverage for that injury from January 25, 2001 to December 2004. Plaintiff was subsequently notified, in December 2004, that her claim for long-term disability would be denied. Then, on September 23, 2005, Johnson and Johnson made a final decision denying Plaintiff benefits.

Over five years later, on February 2, 2011, Plaintiff filed a claim against the Defendants in federal court in the Eastern District of Pennsylvania asserting claims, based on the same denial, under the Employee Retirement Income Security Act of 1974 ("ERISA"). Plaintiff's claims were subsequently dismissed as time-barred in an Opinion and Order dated September 27, 2011, Bidlingmeyer v. Broadspire, et al., Civil Action No. 11-812, Docket No. 17 (E.D.Pa. Sept. 27, 2011).

[1] Plaintiff also moved to amend her motion to remand to correct the court to which, if the motion is granted, the matter should be remanded [Docket No. 7]. That motion is GRANTED.

This suit was initiated shortly before that decision with the filing of a complaint (the "Complaint") in New Jersey state court on July 21, 2011, at a time when Plaintiff was on notice of Defendants' statute of limitations defense. Plaintiff asserts that Defendant Broadspire was served with the Summons and Complaint by Certified Mail Return Receipt Requested on August 3, 2011. Broadspire subsequently removed the matter to this Court on October 18, 2011 based on both the existence of a federal question and diversity of citizenship. Broadspire asserts that, as of the time it removed this action, it had never received proper formal service.

II. Analysis

The Court first addresses Plaintiff's motion for remand.

A. Plaintiff's Motion for Remand

Plaintiff argues that remand is warranted because Broadspire's Notice of Removal was untimely. 28 U.S.C. § 1446(b) governs the timeliness of a notice of removal. Under the statute, "notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based." 28 U.S.C. § 1446(b).

While the plain language of the statute would appear to allow the 30 day notice of removal window to commence upon mere

receipt of the initial pleading, the Supreme Court, in Murphy Bros. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999), interpreted this provision to require "formal service" before the 30 day window begins to run. Di Loreto v. Costigan, 351 F. App'x 747, 751 (3d Cir. 2011). Therefore, while Broadspire filed its Notice of Removal more than 30 days after it received the Summons and Complaint, Broadspire's mere receipt of these pleadings is insufficient if that receipt does not amount to formal service.

Under Federal Rule of Civil Procedure 4(h), a corporation, like Broadspire, must be served by either: (1) following state law for service of process in either the state in which the District Court is located or in which service is made; or (2) delivering a copy of the summons and complaint to an "officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and – if the agent is one authorized by statute and the statute so requires – by also mailing a copy of each to the defendant." Federal Rule of Civil Procedure 4(h); Federal Rule of Civil Procedure 4(e)(1). Here, the only evidence of any type of service is the mailing by certified mail return receipt requested to Broadspire in Florida. Because Plaintiff has not alleged delivery to an officer or agent of Broadspire, in order for Plaintiff's mailing to constitute proper service it must satisfy the state law of

either New Jersey, where this Court sits, or Florida, where the mailing was made. Resh v. Brosnac, No. 11-cv-019245, 2012 WL 1114583, at *1-2 (E.D.Pa. Mar. 30, 2012)(finding that, because mailing would not constitute the "delivery" contemplated by the rule, plaintiff would have to show that the mailing satisfied the service requirements of the state in which the District Court sat or where the mailing was made).

With respect to service under New Jersey law, New Jersey allows for: (1) personal service; (2) service by certified mail, return receipt requested and, simultaneously, by ordinary mail, but only upon an affidavit demonstrating that, despite diligent effort and inquiry, personal service cannot be made to a corporation's registered agent for service, principal place of business, or registered office ("Substituted Service"); (3) any form of service provided by law; (4) if service cannot be made under the New Jersey rule, any form of service authorized by the court, consistent with due process; or (5) service by registered, certified, or ordinary mail, but only if the defendant answers the complaint or otherwise appears in response thereto within 60 days of mailed service ("Optional Mailed Service"). N.J. Ct. R. 4:4-4.

Here, Plaintiff's service by mail was ineffective under New Jersey law. The only two potentially applicable forms of service, given that Plaintiff's only service was by certified

mail return receipt requested, are Substituted Service and Optional Mailed Service. Plaintiff cannot avail herself of Substituted Service because: (1) no affidavit was filed in support of such service; (2) service was not made by ordinary mail in addition to certified mail return receipt requested; and (3) service was not made to Broadspire's registered agent for service, principal place of business, or registered office.

This leaves only Optional Mailed Service. Three courts have previously analyzed the interplay between New Jersey's Optional Mailed Service rule and the federal removal rule. MacDonald v. Twp. of Wall Police Dep't, No. 11-1598, 2011 WL 1740410, at *2 (D.N.J. May 4, 2011); Granovsky v. Pfizer, 631 F. Supp. 2d 554, 562 (D.N.J. 2009); In re Pharm. Indus. Average Wholesale Price Litig., 431 F. Supp. 2d 109, 121 (D.Mass. 2006). All three concluded that mere mailing of the summons and complaint, pursuant to the Optional Mailed Service Rule, can trigger the 30-day clock for removal, even if the defendant has not answered or otherwise appeared in response thereto, so long as the defendant has received the summons and complaint. Id. These courts reasoned that, while this service would not be effective for obtaining personal jurisdiction over the defendant, it was sufficient to trigger the removal clock because: (1) the purpose of the Optional Mail Service's appearance requirement is to ensure proper notice and that

concern is addressed when the Court is satisfied that the mail was received; and (2) the Supreme Court's formal service requirement, established in Murphy, could be satisfied by receipt of the summons and complaint because the decision merely clarified that, consistent with the removal statute's "service or otherwise" language, the statute only requires receipt of both the summons and complaint and not the perfection of service. Id. This Court disagrees. The Supreme Court's decision in Murphy dictates that the removal clock does not begin to run until the plaintiff has obtained personal jurisdiction over the defendant. Exercise of personal jurisdiction over a defendant requires that the plaintiff properly serve the defendant, not merely provide it notice of the action. Grand Entm't Grp. v. Star Media Sales, Inc., 988 F.2d 476, 492 (3d Cir. 1993)(holding that proper service, not merely notice, is a prerequisite to personal jurisdiction).

In Murphy, the Supreme Court considered whether the fax of a courtesy copy of a complaint was sufficient to trigger the 30 day removal clock. Murphy, 526 U.S. at 347. The Supreme Court concluded that it was not. Id. It instead held "that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from service of the summons, but not by mere receipt of the complaint unattended

by any formal service." Id. at 347-48. The "service" referenced in the holding, in the context of the entire opinion, can only be read to mean perfected service sufficient to obtain personal jurisdiction over the defendant. See Alicea v. Outback Steakhouse, No. 10-4702, 2011 WL 1675036, at *3-4 (D.N.J. May 3, 2011)(interpreting Murphy similarly in concluding that the removal clock began to run when proper service was waived, not when the defendant received a copy of the summons and complaint by certified mail).

The Supreme Court's entire analysis was grounded in the notion that it would be unfair to impose any kind of procedural imposition on a defendant over whom the court did not yet have personal jurisdiction. It specifically noted that it read the removal provision "in light" of what it called the "bedrock principle . . . [that a] defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process." Murphy, 526 U.S. at 347 (emphasis added). The Court further noted that "[s]ervice of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant." Id. at 350. Consistent with that principle, the Supreme Court questioned the propriety of requiring someone "who has not yet lawfully been made a party to an action . . . to decide in which court system the case should be heard." Id. at

355 (quotation and citation omitted). The Court's view that "service" contemplates something more than mere receipt is also evidenced in its choice of language. The Court consistently distinguished between service and receipt in its analysis and described the service requirement as "formal service" on three occasions. Id. at 348, 354, 356. Finally, the Supreme Court concluded its analysis by specifically equating the required service with a court's jurisdiction over the defendant. Id. at 356 ("In sum, it would take a clearer statement than Congress has made to read its endeavor to extend removal time (by adding receipt of the complaint) to effect so strange a change-to set removal apart from all other responsive acts, to render removal the sole instance in which one's procedural rights slip away before service of a summons, *i.e.,* before one is subject to any court's authority.")(emphasis added).

Here, even assuming that Broadspire's Notice of Removal could constitute an appearance under Optional Mail Service, service was never perfected because Broadspire's Notice of Removal was filed over 76 days after Plaintiff's mailing, more than the 60 days allowable for proper service. Bartlebaugh v. City of Camden, No. 05-121, 2006 WL 414095, at *1-2 (D.N.J. Feb. 16, 2006)(holding that failure to respond or appear within 60 days of mailing requires plaintiff to avail itself of traditional means of service). Therefore, the Plaintiff had not

properly served Broadspire under New Jersey law at the time of the matter's removal.

The same is true under Florida law. In Florida, service by certified mail is only permitted where the plaintiff provides and obtains a waiver of conventional personal service. Dyer v. Wal-Mart Stores, Inc., 318 F. App'x 843, 844 (11th Cir. 2009). Plaintiff does not purport to have sought or obtained waiver of service from Broadspire. Therefore, service of process was not perfected under Florida law.

Because Plaintiff had not properly served Broadspire at the time Broadspire filed its Notice of Removal, this Court did not yet have personal jurisdiction over Broadspire at that time. Therefore, Broadspire's time period to remove this matter had not yet begun to run at the time of removal. Its removal was therefore timely.

The Court now addresses Defendants' motion.

B. Defendants' Motion For Judgment On The Pleadings

Defendants have moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). A motion for judgment on the pleadings under that Rule is governed by the same standard as a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) and "will not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of

law." Spruill v. Gillis, 372 F.3d 218, 223 n.2 (3d Cir. 2004)(holding that there is no material difference between the two standards); Minn. Lawyers Mut. Ins. Co. V. Ahrens, 432 F. App'x 143, 147 (3d Cir. 2011)(reciting standard under 12(b)96)). In this case, Defendants have moved for judgment on the pleadings on two grounds: (1) claim preclusion from Plaintiff's Eastern District of Pennsylvania action; and (2) pre-emption of Plaintiff's common law claims.

1. Claim Preclusion

Claim preclusion is a permissible basis for judgment on the pleadings. Churchill v. Star Enters., 183 F.3d 184, 194 (3d Cir. 1999)(affirming District Court grant of judgment on the pleadings based on claim preclusion). Claim preclusion prevents piecemeal litigation by precluding parties from relitigating issues that were or could have been raised in prior actions. Id. It applies where there is: "(1) a final judgment on the merits in a prior suit involving; (2) the same parties or their privities; and (3) a subsequent suit based on the same cause of action." Id.

In analyzing whether the subsequent suit is based on the same cause of action, the Court looks not just to "claims actually litigated, but to those that could have been litigated in the earlier suit if they arise from the same underlying transaction or events." Toscano v. Ct. Gen. Life Ins. Co., 288

F. App'x 36, 38 (3d Cir. 2008). "Courts should not apply this conceptual test mechanically, but should focus on the central purpose of the doctrine, to require a plaintiff to present all claims arising out of the same occurrence in a single suit." Churchill, 183 F.3d at 194. Applying this principle, claim preclusion may apply even where the plaintiff asserts a new legal theory in a subsequent suit, so long as that theory could have been raised in the prior action. Lubrizol Corp. v. Exxon Corp., 929 F.2d 960, 964 (3d Cir. 1991).

Here, Plaintiff does not dispute the second required element of claim preclusion – identity of parties. Plaintiff does, however, dispute the first and third required elements. With respect to the first element, Plaintiff contends that the prior action's dismissal on statute of limitations grounds is not a "final judgment on the merits." This Court disagrees. "The rules of finality . . . treat a dismissal on statute-of-limitations grounds . . . as a judgment on the merits" for res judicata purposes. Elkadrawy v. Vanguard Grp., Inc., 584 F.3d 169, 173 (3d Cir. 2009)(citing and quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 228 (1995)); Taggart v. Chase Bank USA, N.A., 375 F. App'x 266, 268 (3d Cir. 2010)(finding that dismissal on statute of limitations grounds was dismissal on merits for res judicata purposes); Smalls v. United States, 471 F.3d 186, 192 (D.C.Cir. 2006)(same); Tahoe-Sierra Preservation

Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064, 1081 (9th Cir. 2003)(same); Eb-Bran Prods., Inc. v. Warner/Elektra/Atlantic Corp., 242 F. App'x 311, 312 (6th Cir. 2007)(finding that state law characterization of claim preclusive effect of dismissal based on statute of limitations grounds was immaterial because federal law applied to federal judgment in federal question case and that, under federal law, statute of limitations dismissal was final judgment for claim preclusion purposes).

With respect to the third element, Plaintiff argues that her claims are not identical because she is "not plead[ing] a cause of action pursuant to ERISA," and is only asserting a contractual claim. To the extent Plaintiff's claim can be construed as an ERISA claim despite Plaintiff's protests to the contrary, it is identical to Plaintiff's prior claim. To the extent that this Court credits Plaintiff's assertion that Plaintiff is not asserting an ERISA claim and is instead asserting a breach of contract claim, it is immaterial that Plaintiff is presenting a different legal theory here. Plaintiff's claims here are based on the exact same facts as her previous ERISA action claims and could have been asserted in the Pennsylvania action. Plaintiff has no excuse for her failure to assert the claim in her earlier action as this suit was

initiated while that suit was still pending.[2] Therefore, they constitute the "same" cause of action for claim preclusion purposes. Churchill, 183 F.3d at 195 ("Thus, we conclude that the district court properly found that the claims were the same under Athlone, and that claim preclusion should apply. There is simply no escaping from the fact that Churchill has relied on different legal theories to seek redress from the Appellees for a single course of wrongful conduct. Because the claims were the same, Churchill asserted a single cause of action in both cases that the doctrine of claim preclusion required her to have joined in one suit."). Because all three elements of claim preclusion are met, Plaintiff's claims are barred and must be dismissed.

2. Pre-emption

In addition to being barred by claim preclusion, Defendants argue, and Plaintiff does not dispute, that Plaintiff's common law claims are also pre-empted under ERISA. This Court agrees. Because Plaintiff's contract claim relates to benefits under an employee benefit plan, it is pre-empted by ERISA. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987)(finding that common law causes of action that "relate to" an employee benefit plan are pre-empted); Lutz v. Phillips Elecs. N. Am. Corp., 347 F.

[2] The Court recognizes that, even if Plaintiff had alleged a breach of contract claim in the prior action, it would have, for the reasons discussed below, been pre-empted by ERISA.

App'x 773, 776 (3d Cir. 2009)(holding that breach of contract claim related to underpayment of benefits was pre-empted by ERISA).

III. Conclusion

For all these reasons, Plaintiff's motion is DENIED and Defendants' motion is GRANTED. Plaintiff's Complaint is DISMISSED with prejudice.

s/Renée Marie Bumb
RENÉE MARIE BUMB
United States District Judge

Dated: June 19, 2012